U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 08 October 2003

CASE NO. 2002-DCA-00001

In the Matter of:

NORMA J. MOSQUEDA,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Appearances:

For the Petitioner
Norma J. Mosqueda,
Pro Se, *Los Angeles, California*

For the Respondent
Cheryl L. Adams, Esq.,
Office of the Solicitor of Labor, *San Francisco, California*

Before:

William Dorsey
Administrative Law Judge

DECISION AND ORDER WAIVING DEBT AND REQUIRING REFUND

This is a dispute under Section 5 of the Debt Collection Act of 1982 (Pub. L. 97-365), 5 U.S.C. § 5514, under the debt waiver provisions of 5 U.S.C. § 5584 (Pub. L. 90-616), and the Secretary of Labor's implementing regulations at 29 C.F.R. Subpart D (§ 20.74 *et seq.).* Together the statutes and regulations prescribe procedures for handling debts, authorize deductions from wages of federal employees to pay debts to the United States for such things as salary overpayments, and set standards for waiving those debts.

The Department of Labor offset money from wages due to Norma Mosqueda, an employee in the Los Angeles Office of the Solicitor of Labor (Employee or Petitioner), because it mistakenly paid her for a holiday while she was away from her job. The Department argues that an administrative law judge is no more than a bookkeeper, insuring that the amount of the debt is correct, but has no business looking into whether the debt should be waived.

Fostering and promoting the welfare of wage earners is a central part of the Department's mission. http://www.dol.gov/opa/aboutdol/mission.htm. Yet the Department repeatedly failed to follow its own procedures in dealing with Employee, who was away from her job when the overpayment occurred due to a work-related injury, and suffered financial distress because the Department did not make timely payment of her workers' compensation benefits. It ignored her waiver request when it made its offset without notice, although its own policies support a waiver. The Department has devoted resources to oppose Employee's waiver request out of proportion to the amount involved. And of all holidays, the pay at issue was for Labor Day. The Department's incongruous conduct would draw a smile from Inspector Javert.

Because the Department's action took no account of the factors justifying waiver of the debt, and because its refusal to waive the overpayment was contrary to equity and good conscience, and was not in the best interests of the Government, the Department shall refund the money deducted from Employee's salary.

FACTS AND PROCEDURAL HISTORY

Employee's affidavit dated June 9, 2003, and two volumes of exhibits, numbers 1 through 24, are admitted into evidence, with the exception of exhibit 17, which Employee withdrew in her reply. The Department's exhibits 1 through 15 are admitted. No party requested to appear in person to present evidence, so the matter has been decided on the record, as 29 C.F.R. § 20.81(c) contemplates.

The Department withdrew its contention that this matter could only be determined through the grievance procedure in the collective bargaining agreement it entered into with the National Council of Field Labor Locals, AFGE/AFL-CIO (Department's Brief at pg. 3).

Employee had arm surgery due to a work injury, so she was entitled to Federal Employees' Workers' Compensation benefits from July 27, 2001 to October 9, 2001. Petitioner's Affidavit (PA) at pg. 2, ¶ 4. Those benefits replace less than all of an employee's pay. 20 C.F.R. § 10.403(b). The timekeeper for her work unit incorrectly coded Employee's electronic time card for pay period 19 to indicate a holiday instead of leave without pay for Labor Day, September 3, 2001[1]. Petitioner's Exhibit (PX) 1. The Department accepts that the payment was an error made through no fault of Employee (Department's Brief at pg. 2). The gross amount paid was $246.64; the net amount to her after withholdings was $114.78. *Id*. The $131.86 withheld partially duplicated deductions of $91.39 taken from her workers' compensation benefits for health insurance ($60.00), basic life insurance ($10.39) and optional life insurance ($21.00). PA at pg. 2, ¶ 7. The Department also withheld $13 for union dues which Employee had paid directly to the union by personal check, an error which Employee

[1] An employee is entitled to holiday pay when she works the day before and after a holiday.

rectified directly with the union. PX 1; PA at 2, ¶ 7b. Thus the Department deducted $91.39 too much in pay period 19, before the holiday pay is considered.

When the electronic funds transfer into her checking account was more than she expected, Employee contacted the timekeeper to learn why it was so large. She was assured the deposit was correct, because annual performance-based cash awards were disbursed to employees of the Solicitor's office that pay period. Her earnings and leave statement were held at the work site until her return. PA at pg. 2, ¶ 5.

Employee discovered the duplicate deductions for health and life insurance on October 16, 2001, shortly after her return to work. She asked a fiscal operations technician in the San Francisco Office of the Assistant Secretary for Administration and Management (OASAM), Armando Macale, to arrange reimbursement for them. PX 2. In doing so, Mr. Macale discovered the timekeeper's error, and the overpayment. He told Employee to repay the net amount of $114.78 to the Department, and that the health benefit deduction would be reversed when the Department's national office corrected the overpayment. PX 2. Employee immediately requested a waiver of the overpayment under 5 U.S.C. § 5584(a)(2)(A), due to the financial hardship she was experiencing because errors by the Department's Kansas City unit handling her worker's compensation benefits had left her unpaid for 7 weeks. PX 4 at pg. 4; PX 13 at pg. 17. She also pointed out she had inquired about the larger-than-expected funds transfer, been given good reason to believe it was not an error, and spent that money in reliance on the Department's advice, because late fees accruing on other debts while her compensation benefits had not been timely paid "were eating me alive." PX 4.

A series of e-mail communications in late November and early December 2001 between Employee and Leslie Henry, OASAM lead fiscal operations technician, dealt with whether Employee could buy back the sick leave she used after exhausting the 45 days of continuation pay she received on account of her workers' compensation injury. PX 9. As part of that effort, on December 4, 2001, Employee amended her timesheet for pay period 19, showing her status as leave without pay for the holiday. PX 12.

Employee received no response to her waiver request or warning that the Department was about to offset the holiday pay from her current pay. I find Ms. Henry's assertion that Employee agreed to the offset not credible. DX 2 at pg. 6. Consent would be wholly inconsistent with Employee's repeated requests for waiver, made first in writing and then in person on November 9, 2001 to the OASAM Regional Financial Officer, and with her prompt objection to the offset (PX 6; PX 13 at pg. 18). The Department offset the gross amount, doing nothing to correct the double deductions for health and life insurance taken from in pay period 19. I find it unlikely that Employee would have agreed to this, for she initially contacted Mr. Macale to correct the deductions. Moreover, the Department acknowledged that the correct process was not followed and the employee (presumably Ms. Henry) had been counseled about it so the error would not recur. PX 11. Employee's December 22, 2001, earnings and leave statement reflects a reduction of $246.64 in her wages for pay period 26. PX 5.

On February 20, 2002, the OASAM Regional Financial Officer notified Employee that (1) the Department deducted the overpayment from Employee's salary in the belief that she

approved the deduction and (2) the Department would not repay the deducted funds to her. PX 12. The denial of repayment should be read in light of his slightly earlier memo to Employee of January 23, 2002, stating that "we cannot repay money to you which was improperly paid in the first place." PX 9. The Regional Financial Officer sent a copy of the "Statement of Debtor's Rights and Responsibilities" to Employee on March 21, 2002 which gave her 15 days to request reconsideration of the decision to collect the indebtedness, and notified her of the right to a hearing, which, the notice said, would result in deferral of collection proceedings. PX 13.

Employee filed a timely request for hearing on March 29, 2002.

I.

Employee characterizes the administrative offset that reduced her wages in pay period 26 as wrongful. The statute and the Department's two regulations require 30 days advance notice before an offset is taken, 5 U.S.C.§ 5514 (a)(2)(A); 29 C.F.R. §§20.78(b) and 20.85. The Department official assigned to consider her waiver request, the OASAM Regional Administrator, did not act on it. *See* the delegation made in the Department of Labor Manual Series, Part 6 (Financial Management)(DLMS-6) 1111(b)(2)(b) (Department EX 4 at 16). She seeks a refund of the sum deducted from her pay in December 2001, relief authorized by 5 U.S.C. § 5584(c); 29 C.F.R. § 20.78 (b)(13) and § 20.87(a)(1), which the Department implements in DLMS-6, 1174 (Department EX 4 at pg. 32). The Regional Financial Officer appears to have overlooked these authorities when he told Employee the money could not be repaid to her.

The Department concedes that prior to making the salary deduction, it failed to:

- provide Employee with written notification of both the debt's existence and amount,
- notify Employee of the intention to offset the money from Employee's salary, or
- give Employee the opportunity to inspect its records pertaining to the debt and to request a hearing prior to the salary offset. PX 11.

Neither did it evaluate the merits of Employee's waiver request before or after she complained about the offset. The Department regards these cumulative failures as harmless, and asks that the salary deduction be upheld.

The substantive provisions in § 5 of the Debt Collection Act allow the United States to collect debts owed by federal employees through installment deductions from current pay. 5 U.S.C. § 5514(a)(1). Procedures the statute sets for implementing this authority must be honored by an agency head.[2] To ensure that employees would be treated fairly, Congress took the unusual step of barring anyone under the supervision or control of the agency head from conducting the hearing in which an employee challenges the existence or amount of a debt, or

[2] The Act entitles the employee/debtor to have (1) a minimum of 30 days' written notice of the existence and amount of the debt and the agency's intention to collect the debt via salary deductions; (2) an opportunity to inspect and copy Government records relating to the debt; (3) an opportunity to enter into a written agreement with the agency establishing a schedule for repayment; and (4) an opportunity for a hearing on the determination of the agency concerning the existence or the amount of the debt, and the terms of the repayment schedule if no written agreement exists between the employee and the agency. 5 U.S.C. § 5514(a)(2).

the agency's proposed repayment schedule. 5 U.S.C. § 5514(a)(2)[3]. Congress balanced the Government's interest in efficient debt collection with due process protections for employees before their pay could be affected. S. Rep. No. 378, 97th Cong., 2nd Sess. 23-24, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3377, 3398-3400.

The Department first argues that an administrative law judge may not review this matter because it issued no final determination of the existence and amount of the debt. Without a final determination, the agency is not entitled to an offset from current pay. S. Rep. No. 378, 97th Cong., 2nd Sess. 23, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 3399. When it took all the money it claimed, the Department's position that the debt is due undeniably became final, in spite of Employee's appropriate steps to challenge collection. It is unrealistic to treat the Department's action as anything short of final. It would do away with the opportunity for a hearing Congress gave employees before an agency may collect debts.

Next the Department would limit the scope of this review to whether it has actually established the existence and correct amount of the overpayment. When the Department issues a notice proposing a salary offset to satisfy an overpayment, the employee/debtor has the opportunity to request a hearing by an administrative law judge. 5 U.S.C. § 5514(a)(2)(D). Review includes whether the agency has proven a debt, the amount of the debt, and the terms of an appropriate repayment schedule. *Id*.; 29 C.F.R. § 20.81(a).

The proceeding is not confined to those issues. The structure of the Secretary's regulation at 29 C.F.R. § 20.81 implies that the administrative law judge also reviews the additional question whether a request to waive the overpayment should be approved. The regulation grants an employee/debtor an oral hearing before the judge rather than a hearing on a written record whenever a statute authorizes or requires the Department to "consider waiver of the indebtedness involved[4]." 29 C.F.R. § 20.81(c)(1) There would be no reason to consider evidence about waiver unless the judge is to apply it to the facts presented. Considering a waiver request in conjunction with a hearing to determine the existence and amount of an overpayment is consonant with the procedure the Secretary prescribed for the Federal Employees' Compensation Act (FECA) 5 U.S.C.§ 8101 *et seq.*, where an employee's liability to repay a miscalculated workers' compensation benefit and any waiver request are adjudicated together. *See* 20 C.F.R. § 10.431(d), §10.438 and §10.440. Waiver of this overpayment is permitted by 5 U.S.C. § 5584(a)(2)(A), because the Government's claim arises from calculation of Employee's salary for pay period 19 in 2001, and the amount in issue is less than $1,500.00.

[3] The Department's change in the final text of 29 C.F.R. § 20.78(b)(7) from the text originally proposed reflect the concern for fairness. See 52 F.R. 3772 (Feb 5, 1987). The modification allows employees of the Labor Department's Office of Administrative Law Judges to have their review proceedings such as this (to determine the existence and amount of a debt and terms of a repayment plan under 29 C.F.R. § 20.81) to be heard and decided by a person not in the Office of Administrative Law Judges, and not under the supervision and control of the Secretary of Labor.

[4] No party has requested an oral hearing, so none is required, *Pigrenet v. Boland Marine and Manufacturing Co.*, 656 F.2d 1091, 1095 (5th Cir. 1981)(en banc).

The Department contends that waiver determinations may only be reviewed by the Office of the Solicitor, under DLMS-6, 1173(b), which says:

> Appeal of the OCFO's Decision to Deny Waiver. Individuals have the right to appeal the OCFO's decisions to deny waiver with the Office of the Solicitor. DX 4 at pg. 32.

The argument suffers from several infirmities. The Manual does not give the Solicitor's Office exclusive review authority. No one suggested to Employee that her appeal from the refusal to grant a waiver should be directed to some person or group in the Office of the Solicitor, either at the regional or national level. The quoted language focuses on initial denials by the OCFO, which I take to be the Department's Office of the Chief Financial Officer, where authority resides to waive erroneous wage payments of up to $100,000.00 under DLMS-6, 1111(a), and (b)(2)(a). That official never denied Employee's waiver request. Indeed, no Departmental official has denied it, but the February memorandum of the Regional Financial Officer at PX 12 obviously was meant to put an end to the matter, and along with the statement of rights sent on March 21, 2002 prompted this request for a hearing. PX 14. I assume he is an "OASAM Regional Administrator" as the term is used in DLMS-6, 1111(b)(2)(b), who has been delegated authority to waive debts up to $3,000.00. It is not clear that his decisions would be appealable to the Office of the Solicitor under the quoted language from the Manual, however.

But these are trifling arguments. The major difficulty with the contention that the Solicitor of Labor is the only official who can review or modify an initial waiver denial is that it is inconsistent with 29 C.F.R. § 20.81(c)(1), at least in cases such as this, where a request has been made for a hearing by an administrative law judge. If this distinction fails to harmonize the regulation and the Manual, the agency must follow its own duly promulgated regulation, which the Manual can neither countermand nor repeal. Should there be an irreconcilable conflict between 29 C.F.R. § 20.81(c)(1) and DLMS-6, 1173(b), the Manual yields. I believe the Secretary's regulation assigns administrative law judges authority to consider Employee's waiver request in the course of this proceeding.

An administrative law judge does not consider a waiver request that already has been fully adjudicated elsewhere. For example, an employee may not use a Debt Collection Act claim to collaterally attack liability for an overpayment which had been adjudicated under FECA, 5 U.S.C. 8101 *et seq.,* when waiver had been raised there. Action of the Secretary of Labor or her designee to allow or deny a payment under FECA is final, conclusive and not subject to judicial review. 5 U.S.C. § 8128(b); *Grimes v. Dep't of Labor*, 2000-DCA-00001, slip op. at 1 (ALJ Oct. 31, 2001)(the issue whether the employee was "at fault" in causing the overpayment had been adjudicated by the Employee's Compensation Appeals Board and could not be re-litigated by requesting a waiver of the overpayment).

The holiday pay of $246.64 was an ovrpayment. The Department retains $91.39 from Employee to which it has no colorable claim, the double deductions taken from the Employee in pay period 19. The Department does not deal with these deductions in its brief. This amount must be credited to Employee in all events. It would reduce the amount of any indebtedness to the Government, for it arose out of the same transaction or occurrence, *viz.,* the Department's

calculation of Employee's pay and benefits for pay period 19, whether as salary or as worker's compensation benefits. *See* DLMS-6, 1170(b)(2), which calls for the netting of over and under payments.

II.

Employee argues that she may recover the offset as back wages under the Back Pay Act, 5 U.S.C. § 5596. An employee receives back pay plus interest whenever an appropriate authority finds an employee lost pay, allowances, or differentials due to an unjustified or unwarranted personnel action. 5 U.S.C. § 5596(b)(1)(A)(i); *Roepsch v. Benson*, 846 F.Supp. 1363, 1370 (E.D. Wis. 1994). An outstanding debt owed by the Government to an employee does not constitute an unjustified or unwarranted personnel action.[5] *See Bell v. United States*, 23 Cl.Ct. 73, 77 (Cl.Ct. 1991) ("Mere failure by a government agency to pay money due is not the kind of adverse personnel action contemplated in the Back Pay Act"); *see also Garcia v. U.S.*, 996 F.Supp. 39, 43 (D.D.C. 1998) (the Back Pay Act is inapplicable to claims for compensation by employees mistakenly permitted to remain enrolled in an incorrect retirement system).

Employee claims the Department owes her money because of a wrongful deduction from her salary. No "unjustified or unwarranted personnel action" is involved, so the Back Pay Act provides her no relief .

III.

Lastly, Employee contends that the Department should waive its claim against her, which will entitle her to a refund of the amount offset. 5 U.S.C. § 5584(c); 29 C.F.R. §§ 20.78 (b)(13) and 20.87(a)(1); DLMS-6, 1174. Employee's waiver request was made the day she discovered the overpayment, and so is timely. The Department emphasizes thatwaiver is discretionary, as if that settles the matter. This proceeding is not a review of final action of the Secretary of the type an Article III court would perform, but one to determine the Secretary's action. There is a substantial difference between the two[6]. Application of the appropriate standards favor granting waiver, and refunding the amount offset.

[5] "Unjustified or unwarranted personnel actions" include termination of employment, an agency's denial of a mandatory promotion, and reduction in rank or level. *See Crowley v. Muskie*, 496 F.Supp. 360 (D.D.C. 1980) (State Department employees who were wrongfully removed from the civil service jobs were entitled to retroactive promotion, back pay and attorney fees); *Edwards v. Lujan*, 40 F.3d 1152 (10th Cir. 1994) (Back Pay Act covers illegal refusals to make mandatory promotions of federal employees, but not discretionary promotions); *Donovan v. U.S.*, 580 F.2d 1203 (3d Cir. 1978) (a "personnel action" within the meaning of the statute must result in a reduction of job grade or level).

[6] An Article III court reviewing what happened up to this point would remand the matter to the agency to apply the Secretary's waiver criteria, even if the ultimate answer could be to deny the waiver. The Regional Financial Officer assumed that once the money was recaptured by offset, Employee could never get it back, because it was wrongly paid in the first place. That assumption is inconsistent with 5 U.S.C. § 5584(c); 29 C.F.R. §§ 20.78 (b)(13) and 20.87(a)(1); and DLMS-6, 1174. When an agency official fails to exercise judgment in the erroneous belief that there is no discretion, courts remand. See *State of Arizona v. Thompson*, 281 F.3d 248, 253 (D.C. Cir. 2002).

A claim of the United States based on an erroneous salary payment may be waived when collecting it would be against equity and good conscience, and not in the best interests of the United States. An agency head may waive a claim for less than $1,500, applying standards the "authorized official," the Director of the Office of Management and Budget, prescribes. 5 U.S.C. § 5584(a)(2)(B), (g)(2). I have been unable to find standards from OMB which agency heads apply to determine small waiver requests, and the Department of the Treasury Directive 34-01 (July 12, 2000) found at http://www.treasury.gov/regs/td34-01.htm implies that there are none.

The Department of Labor implements the waiver statute[7] essentially by restating it. Waiver is granted when (1) the application is received within three years immediately following the date on which the erroneous payment was discovered; and (2) collection action on the claim would be against equity and good conscience and not in the best interest of the United States. DLMS-6, 1170 (a)(1)-(2). For amounts of $300 or less, little or no documentation or investigation is necessary. DLMS-6, 1172(d).

With no indication of fraud, misrepresentation, fault or lack of good faith on the part of an employee, the Department routinely grants timely waiver requests. DLMS-6, 1170(a)(2). There is a caveat: a significant unexplained increase in pay that would require a reasonable person to make an inquiry about the correctness of pay ordinarily precludes a waiver, unless the employee brought the matter to the attention of an appropriate official. *Id*. Employee promptly inquired about the electronic funds transfer, and relied to her detriment on the plausible response of her unit timekeeper. Collection of the claim against Employee is against equity and good conscience and not in the interests of he Government, under the Department's own standards.

ORDER

It is ordered that:

1. collection of the overpayment owed by the Employee in the amount of $246.64 is waived, and

[7] *See, e.g.,* the generally similar "Guidelines for Determining Requests [For Waiver]," U.S. Department of the Treasury Directive 34-01 (2000), *available at* http://www.treasury.gov/regs/td34-01.htm.. *See also*, 42 U.S.C. § 404(b), and the Commissioner of Social Security's implementing regulations at 20 C.F.R. § 404.506 - § 404.527 (standards for waiver of recovery of Social Security overpayments); and 20 C.F.R. § 416.550 *et seq.* (standards for waiver of recovery of Supplemental Security Income overpayments). The statutory "against equity and good conscience" standard for overpayment waivers appears to have its origin in this text from the Social Security Act.

2. the Department shall refund the money offset from Employee's salary, in the amount of $246.64, plus the excess health and life insurance deductions of $91.39 taken in pay period 19 of 2001.

A

WILLIAM DORSEY
Administrative Law Judge